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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 111

H. J. HARRIS, GEORGE W. HARTMAN, OLEN B. HINER, et al.,

Appellants,

vs.

THOMAS B. STANLEY, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, ET AL.

Appeal from the Supreme Court of Appeals of The Commonwealth of Virginia

Appellants' Petition for Rehearing

O. DAVID ZIMRING,
I. J. GROMFINE,
JUSTUS R. MOLL,
SEYMOUR J. SPELMAN,
Of Counsel

BERNARD CUSHMAN,
Counsel for Appellants
1001 Connecticut Ave., N.W.
Washington, D. C.

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Appellants' Petition for Rehearing

I. Statement

Appellants sought review by this Court of a judgment of the Supreme Court of Appeals of Virginia, holding that Appellants' suit, attacking the constitutionality of the Virginia public utilities seizure law and seeking to enjoin any further enforcement of that law, had become moot because the particular seizure which had been instituted on December 11, 1952, had been terminated.

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[1] Upon motion made by Appellants, and granted by this Court, Thomas B. Stanley has been substituted in the place and stead of John S. Battle as a party appellee.

On October 14, 1954, this Court entered a *Per Curiam* order in this Appeal, stating:

> "It appearing that the cause has become moot, the judgment of the Supreme Court of Appeals of Virginia is vacated and the cause is remanded for such proceedings as by that Court may be deemed appropriate. United States v. Anchor Coal Co., 279 U. S. 812."

In accordance with Rule 58 of the Revised Rules of the Supreme Court of the United States, and for the reasons stated below, Appellants respectfully petition this Court to rehear and reconsider the aforesaid order.

II. Grounds Relied Upon

Appellants respectfully submit: (1) that the aforesaid order of this Court appears to be self-contradictory and its effect upon Appellants' suit is unclear; and (2) that if the aforesaid order is a judgment that the cause has become moot, such a judgment is contrary to well established principles governing the matter of mootness which have regularly been applied by this Court.

1. So far as the first point is concerned, although the order of this Court, quoted above, states that the cause appears to have become moot, it *vacates* the judgment of the Supreme Court of Appeals of Virginia and remands the cause to that Court. Yet, as previously noted, the judgment of the Supreme Court of Appeals of Virginia which is vacated by this order, was likewise that the cause had become moot. This apparent self-contradiction leaves Appellants in serious doubt as to the meaning and effect of the order of this Court. Nor do Appellants find any guidance in the *Anchor Coal* case which is cited in the Court's order. In that case the court below, from whose judgment an appeal to the Supreme Court of the United States had been taken, had issued an injunction against the appellant. Subsequent developments, occurring after the appeal was before this

Court, rendered the cause moot. In consequence, this Court dismissed the appeal on grounds of mootness; but in order that its dismissal of the appeal would not leave extant the injunction issued by the court below, this Court remanded the case to the lower court for the purpose of dissolving the injunction.

No injunction was issued by the court below in the instant case. Appellants' request for an injunction was refused on the merits by the Circuit Court of the City of Richmond and Appellants' appeal from that refusal was denied on grounds of mootness by the Supreme Court of Appeals of Virginia. The procedure adopted by this Court in the *Anchor Coal* case is therefore wholly inapposite.

2. The language of this Court's order of October 14, 1954, leaves Appellants in doubt as to what may be required of the court below as a result of the fact that that court's order denying Appellants' appeal has now been "vacated." But apart from that, Appellants fear that the confusion in that language may reflect the fact that the Appellants may not have adequately brought to the attention of this Court those special circumstances which, consistent with well-established principles of law, militate so strongly against a holding that this cause has become moot.

a) Principal among these is the fact that from the outset of this suit Appellants have made it plain that they are seeking permanent *future* relief from the effects of the Virginia seizure law involved. They believe, and have alleged, that as long as the Governor of Virginia is empowered to seize and operate the Company when a strike is threatened there is a continuous, permanent interference with the right to strike and to bargain collectively, as guaranteed by Federal law. Consistent with that contention, Appellants have from the outset sought relief not only from the particular seizure instituted in 1952, but from a continuation of the power to seize which the statute in question confers, and from any future application of that power. As long as that

is the gravamen of this suit it is difficult to see why the cause became moot solely because the 1952 seizure was lifted.

The situation is directly comparable to that which was before this Court in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290. In that case the government had brought an injunction action against the defendants on the theory that the defendant Association was a combination in restraint of trade in violation of the anti-trust laws. Before the case reached the Supreme Court the Association had been dissolved, and the defendants contended that the case should therefore be dismissed as moot. This Court rejected that contention saying:

> "The prayer of the bill filed in this suit asks not only for the dissolution of the Association, but, among other things, that the defendants should be restrained from continuing in a like combination, and that they should be enjoined from further conspiring, agreeing, or combining. . . . The mere dissolution of the Association is not the most important object of the litigation. The judgment of the Court is sought upon the legality of the agreement itself for the carrying out of which the Association was formed, and if such agreement be declared to be illegal, the Court is asked not only to dissolve the Association named in the bill, but that the defendants should be enjoined for the future."

b) In substance the result this Court reached in the *Trans-Missouri* case was simply an application of one of the most firmly established principles which has guided courts on the question of mootness, i. e., the rule that the mere cessation of unlawful conduct does not make a suit to enjoin that conduct moot if it is possible for the defendant to resume the unlawful conduct. *United States v. Hamburg American Line*, 239 U. S. 466; *Federal Trade Commission v. Goodyear Tire and Rubber Co.*, 304 U. S. 257; *Walling v. Helmerich and Payne*, 323 U. S. 37; *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261. That principle

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is clearly applicable here, for even if it could not be said that the injury sought to be remedied by Appellants' suit is a continuing injury there can be no doubt that as long as the Virginia seizure statute remains in force the defendants are free to resume—indeed they are *required* to resume—at some future date the injury to the Appellants that was inflicted by the 1952 seizure.

c) Indeed, it has often been held that one who is a potential victim of an unconstitutional or otherwise invalid statute need not wait until the injury is actually inflicted, but may bring a suit in equity to enjoin a *threatened* enforcement of the statute. *See: Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365; *Petroleum Exploration Inc. v. Public Service Commission of Kentucky*, 304 U. S. 200; *Thompson v. Smith*, 155 Va. 367. Thus Appellants could properly have instituted and maintained this suit even though no actual seizure had ever occurred, solely on the basis of the threat, inherent in the statute, that if a strike ever becomes imminent a seizure would be imposed. That being so, it seems wholly unreasonable to hold that because a seizure actually was instituted this suit became moot when the seizure was terminated before the constitutionality of the statute was determined.

d) Appellants respectfully submit that each of these sound and firmly established principles is violated by the order of this Court of October 14, 1954, if that order in fact holds that the cause has become moot. To this must be added the very cogent consideration (as outlined in Appellants' Statement as to Jurisdiction, pp. 12-13) that such a result has the practical effect of preventing a test of the constitutionality of the statute in question except in such a case as may involve a deliberate violation of the criminal sanctions of the statute or by the equally tortuous path of a case in which actual money damages can be alleged and proved. Appellants do not believe that this Court will, upon further consideration, adhere to a judgment that lacks

support in legal principle and is so inequitable in its result.

III. Conclusion

For all of the foregoing reasons Appellants respectfully request this Court to rehear and reconsider its order of October 14, 1954, to hold that this cause is not moot, and to consider and decide the federal questions raised.

Respectfully submitted,

BERNARD CUSHMAN,
Counsel for Appellants.

O. DAVID ZIMRING,
I. J. GROMFINE,
JUSTUS R. MOLL,
SEYMOUR J. SPELMAN,
Of Counsel.

Certificate

In accordance with Rule 58 of the Revised Rules of the Supreme Court of the United States I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay.

BERNARD CUSHMAN,
Counsel for Appellants.